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No. 10-687

Supreme Court, U.S.
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In the Supreme Court of the United States

MARK ALBRECHT; DIANE ALBRECHT, Both individually and on behalf of others similarly situated,
Petitioners,

v.

BRIAN TREON, M.D., Individually and in his official capacity as Coroner of Clermont County, Ohio, and on behalf of others similarly situated; BOARD OF COUNTY COMMISSIONERS OF CLERMONT COUNTY, OHIO, for itself and on behalf of others similarly situated; MARY WALKER, in her capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated; BOB PROUD, in his capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated; SCOTT CROSWELL, in his capacity as commissioner of Clermont County, Ohio, and on behalf of other similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a decision by a state supreme court holding that the state has never recognized a property interest in autopsy specimens removed and retained by a coroner during the course of a statutorily-mandated, investigative autopsy undertaken pursuant to the police power of the state must be distinguished from a decision recognizing that next of kin have a property interest in organs subject to donation?

Whether a property right is properly established by state law as interpreted by the state's highest court?

Whether *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592 (2010) has any relevance to this matter where state law has never provided next of kin a property right in autopsy specimens?

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INTRODUCTION

Decrying the end of federalism as we know it will not make a silk purse out of Petitioners' sow's ear. This matter is a simple one of distinguishing one case -- the present one, involving the proper exercise of the police power of the county coroner to examine and retain body parts during the course of his investigation into cause of death -- from another -- one involving the private right of next of kin to authorize or decline to authorize organ donation.

The district court, finding that the question whether Petitioners had a property right in autopsy specimens, had not been answered by the Ohio Supreme Court interpreting Ohio law, agreed to certify it to the Ohio Supreme Court. In its response, the Ohio Supreme Court held that while Ohio law "give[s] next of kin the right to disposition of the body, that right does not arise until *after* the coroner has performed his duties and does not include forensic specimens that were retained by a coroner for forensic examination and testing." *Albrecht v. Treon*, 118 Ohio St. 3d 348, 357 (2008)(emphasis in the original).

Petitioners argue now, and have argued since the inception of the present case, that a 1991 decision of the Sixth Circuit Court of Appeals, *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), where the Court, interpreting Ohio's Uniform Anatomical Gift Act, found a private property right in organs subject to donation, controls the outcome of this case. Petitioners claim now that the Ohio Supreme Court and the Sixth Circuit have impermissibly overruled binding federal constitutional decisions, in particular *Brotherton*,

which, they allege, provide them with a legitimate claim of entitlement to these autopsy specimens.

There are significant problems with Petitioners' argument. First, *Brotherton* finds only a private right arising under Ohio's Uniform Anatomical Gift Act which permits next of kin to authorize or decline to authorize post-mortem organ donation. Next, Petitioners have failed to inform this Court that in the present case the Sixth Circuit has distinguished *Brotherton* on both its facts and applicable law from the present case where the facts involve a county coroner exercising his discretion with regard to how to perform an autopsy pursuant to a different set of Ohio statutes, and, finally, that no right offered by *Brotherton* has been implicated.

STATEMENT OF THE CASE

1. Proceedings below

On May 5, 2006, Petitioners filed their Complaint in this matter in the United States District Court for the Southern District of Ohio, Western Division (hereinafter "the Ohio case") as a putative plaintiffs' class action against a putative defendants' class of eighty-seven Ohio county coroners and boards of county commissioners. On January 28, 2008, subsequent to the filing of the Ohio case, Appellant's counsel filed a strikingly similar Complaint in the United States District Court for the Eastern District of Michigan, *Waeschle v. Dragovic, et al.*, Case No. 2:08-CV-10393 (hereinafter, "the Michigan case"). In both cases, the parties alleged a violation of their due process right to notice and an opportunity to be heard before deprivation of a property right -- autopsy

specimens from the bodies of their respective next of kin held by a coroner for study and disposal. In both complaints, the parties alleged that decisions of this Court clearly established that next of kin had a property interest in body parts of deceased relatives. In the Ohio case, the Albrechts asserted:

> The law in this area has been clearly established by the Sixth Circuit in *Brotherton v. Cleveland M.D.*, 923 F.2d 477 (1991), in which the Hamilton County Coroner's Office was a party. The Sixth Circuit held that family members do have a property interest in the body of their dead loved one which is protected by the Constitution and is enforceable pursuant to 28 U.S.C. Section 1983 [sic]. (Emphasis in the original.)

In the Michigan case, Waeschle asserted:

> The law in this area has been clearly established by the Sixth Circuit in *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir., 1995). The Sixth Circuit held that family members do have a property interest in the body of their dead loved one which is protected by the Constitution and is enforceable pursuant to 28 U.S.C. Section 1983 [sic].

In March 2007 the Ohio district court granted defendants' motion to certify the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a property right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Order Granting Motions to Certify, Case No. 1:06-CV-274, Pet'rs' App. E, p. 83a.

The Ohio Supreme Court accepted the question and on June 5, 2008, answered the question in the negative. *Albrecht v. Treon*, 118 Ohio St. 3d 348 (2008), Pet'rs' App. D, p. 37a.

In the Michigan case, in June 2008, the Medical Examiner filed a motion for summary judgment on the due process claim based upon the defense of qualified immunity. In the alternative, the Medical Examiner moved the district court to certify a question similar to that posed by the Ohio district court to the Michigan Supreme Court. The trial court in the Michigan case denied qualified immunity to the Medical Examiner and denied the Michigan defendants' motion to certify. Thereafter, in September 2008, the Medical Examiner filed an interlocutory appeal to the Sixth Circuit Court of Appeals.

In Ohio, the Clermont County defendants filed their Motion for Judgment on the Pleadings in October 2008. The trial court granted the defendants' Motion in May 2009. Thereafter, on June 12, 2009, the Albrechts timely filed their appeal to the Sixth Circuit Court of Appeals.

On August 14, 2009, the Sixth Circuit issued its decision on the appeal of the Michigan case, *Waeschle v. Dragovic*, 576 F.3d 539 (6th Cir. 2009), reversing the trial court's denial of immunity to the medical examiner and directing the trial court to certify the question of whether a property interest in autopsy specimens exists under Michigan law. Waeschle filed a petition for certiorari in this Court, Case No. 09-879, on January 21, 2010, which was denied on March 29, 2010.

On August 24, 2010, the Sixth Circuit issued its decision in the present case. Distinguishing *Brotherton v. Cleveland*, 923 F.2d 477 (1991) on its facts and applicable law, as it had in *Waeschle v. Dragovic*, the Sixth Circuit affirmed the trial court's dismissal of Petitioners' claims for the reason that they had no property interest in their son's brain and could not, therefore, support the first element of a due process clause claim. The Sixth Circuit affirmed, further, that where no property right in autopsy specimens exists, Petitioners were not deprived of a vested interest. Petitioners now seek this Court's review of the decision in *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010), Pet'rs' App. A, p. 1a.

2. Facts and issues

Petitioners' adult son died in an automobile accident in 2002. After his death, his body was taken by Respondent Clermont County Coroner, as required by Ohio law, for the performance of an autopsy to determine the cause of death. During the course of the autopsy, Respondent Coroner removed and retained Petitioners' son's brain. Petitioners were not informed by Respondent Coroner that he had retained the brain

or any other fluids, tissues or organs after completion of the autopsy. Accordingly, Petitioners buried their son without notice that his brain had been retained.

Petitioners do not assert that they did not receive the body of their son for burial. Nor do Petitioners assert that Respondents mishandled or in any way abused the corpse. They allege, instead, that the exigencies of a properly conducted forensic examination performed by a person lawfully authorized to do so resulted in their not receiving the *entire* body for burial. And, Petitioners assert, Respondents' failure to notify them that because of the dissection and removal and testing of blood, organs, fluids and tissue, they would not receive the entire body for burial, violated the Ohio law as interpreted by *Brotherton*, depriving them of a legitimate claim of entitlement to the forensic autopsy specimens.

It is Respondents' position, however, that *Brotherton* finds only a private right of next of kin to authorize or decline organ donation under Ohio's Uniform Anatomical Gift Act. *Brotherton*, does not, therefore, control the outcome of this case. Because property rights are determined by state law and because it determined that the legal issue involved had not been determined by the Ohio Supreme Court, the federal district court properly certified the question of whether next of kin have a legitimate claim of entitlement to autopsy specimens resulting from a forensic examination of a body to the Ohio Supreme Court. When the Ohio Supreme Court, distinguishing the *Brotherton* holding, determined that no such right exists, either at the time of its decision or at any time in the past, the Sixth Circuit properly affirmed dismissal of this case.

REASONS FOR DENYING THE PETITION

1. The courts below, including the Ohio Supreme Court, have reviewed the present case and have held, consistently, that significant distinctions exist between the facts and applicable law relevant to the present case and those in the decisions Petitioners claim to be controlling.

In 2007, when Respondents filed a motion requesting the district court was to certify the question of Ohio property law to the Ohio Supreme Court, the district court, in granting the motion, cited *Brotherton* for the well-settled proposition that property rights are created by "an independent source such as state law." Order Granting Motions to Certify, *Albrecht v. Treon*, Case No. 1:06-CV-274, p. 4, Pet'rs' App. E, p. 74a (hereinafter "Order"), citing *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Most recently, in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592 (2010), this Court stated "Generally speaking, state law defines property interests ...."

Further, in its Order granting Respondents' Motion to Certify, the district court relied on *Brotherton* to set forth the "standard for determining whether an interest is entitled to due process protections." Order, p. 6, Pet'rs' App. E, p. 75a, quoting *Brotherton v. Cleveland*, 923 F.2d 477, 480. In articulating this standard, the *Brotherton* court cited to well-settled decisions of this Court:

> Property interests protected by the due process clause must be more than abstract desires or attractions to a benefit. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The due process clause only protects those interests to which one has a "legitimate claim of entitlement." *Id.* at 577, 92 S.Ct. at 2709. This has been defined to include " 'any significant property interests,' *Boddie v. Connecticut*, 401 U.S., 371 at 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971), including statutory entitlements.

Id.

Before granting the motion to certify, the district court, however, distinguished the facts informing the present case from those alleged in *Brotherton* as well as citing the differing statutes law applicable to the two matters. First, the district court noted: "The plaintiff in *Brotherton* sued the Hamilton County, Ohio, coroner and others after she learned from her husband's autopsy report that the coroner had – without her consent – permitted her husband's corneas to be removed and used as anatomical gifts." *Id.* at p. 5, Pet'rs' App. E, p. 75a, citing, *Brotherton v. Cleveland*, 923 F.2d at 479-80. The district court noted further that the *Brotherton* decision relied on Ohio's Uniform Anatomical Gift Act, specifically Ohio Revised Code section 2108.02(B), "which grants a third-party survivor, under certain circumstances, the authority to make or decline to make anatomical gifts of body parts to another." *Id.* at p. 6, Pet'rs' App. E, p. 76a, citing *Brotherton v. Cleveland*, 923 F.2d at 482.

At the same time, the district court looked to a decision of the Sixth Circuit, *Montgomery v. County of Clinton*, 940 F.2d 661 (6th Cir. 1991). Although unpublished, *Montgomery* involved the right of a county coroner to perform an autopsy against the wishes of next of kin. There the Sixth Circuit distinguished *Brotherton* as offering a private right in organ donation as opposed to the right of a county coroner to use his discretion as to whether an investigative autopsy would be performed. According to the Sixth Circuit,

> There is no merit in the procedural due process claim founded on the state statutory requirement that the medical examiner make a diligent effort to notify the next of kin as to the decision to perform an autopsy. Whatever the nature of the right created by the statute there is an insufficient liberty or property interest under this statute to create a valid procedural due process claim. Although the notice requirement in the state statute does not appear to be discretionary, it does not purport to establish a right to control the dead body. We would distinguish this case from *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991). In *Brotherton* the plaintiff had an "aggregate of rights granted by the state of Ohio" to control disposition of the body, including the corneas, and thus had a right to refuse removal of corneas for purposes of a cornea transplant. *Id.* at 482. In this case, the state left the decision as to autopsy to the discretion of

> the medical examiner, allowing the autopsy with or without the permission of the next of kin.[1]

Montgomery v. County of Clinton, 940 F.2d 661.

Noting that the Sixth Circuit itself distinguished *Brotherton*, which involved the private right to direct or decline organ donation, from *Montgomery*, "at least in part on the basis of the statute underlying the claim," in granting Respondents' Motion to Certify, the district court held that "the threshold issue in this due process claim is whether, under Ohio law, there exists for the next of kin of a decedent upon whom an autopsy has been performed 'an interest' in the decedent's tissues and organs removed and retained by the coroner for forensic examination and testing." Order, p. 7, Pet'rs' App. E, p. 77a.

Thereafter, the district court certified the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues,

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[1] While the Sixth Circuit does not consider an unpublished case to be binding precedent, it will consider such a case to be persuasive. *Longaberger Co. v. Kolt*, 586 F.3d 459, 468 (6th Cir. 2009). Accordingly, while *Montgomery* is not binding, it did reveal to the district court that as early as 1991, the Sixth Circuit considered the private right set forth in *Brotherton* to be distinct from that asserted by the county coroner performing an investigative autopsy in *Montgomery*. *Montgomery*, 940 F.2d 661 (6th Cir. 1991).

> organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Id. at p. 10, Pet'rs' App. E, p. 83a.

In response, the Ohio Supreme Court held:

> [T]he next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the corner for forensic examination and testing.

Albrecht v. Treon, 118 Ohio St. 3d 348, 358 (2008), Pet'rs' App. D, p. 37a.

Given that state law is the only indicator of what defines a property right, when there is no precedent upon which to rely to determine a particular matter rises to the level of property right, the only avenue is to inquire with the state's highest court. The mechanism provided for by law to make such inquiry is certification of the question of state law to a state supreme court. When, as in this case, the question is one of first impression, the decision to certify[2] a question of state law to a state supreme court is within the federal district court's discretion. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Even the *Stop the*

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[2] Ohio Supreme Court Rule of Practice XVIII was adopted as effective on June 1, 1994. Ohio Sup. Ct. R. Prac. XVIII.

Beach Renourishment, Inc. case upon which Petitioners lean heavily for support of their argument, exhibits the mechanism of certification of an unanswered state law question to a state's highest court. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2595 (2010).

2. The Ohio Supreme Court's clarification of a question of property law regarding specimens from a forensic autopsy in the present case did not eliminate the legitimate claim of entitlement of an individual or next of kin to decide whether to donate organs under the Uniform Anatomical Gift Act.

In reaching its conclusion, the Ohio Supreme Court, as did the federal district court, distinguished *Brotherton* from the facts and law involved in the present case. According to the Ohio Supreme Court,

> The *Brotherton* court, in examining [Ohio] R[evised].C[ode]. 2108.02(B), which governs who may make anatomical gifts of a decedent's body parts, concluded that "[a]lthough extremely regulated, in sum, these rights [possessory right and the right to have the body remain undisturbed] form a substantial interest in the dead body, regardless of Ohio's classification of that interest." *Brotherton*, 923 F.2d at 482. Thus, the court held that the "aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his

> corneas, protected by the due process clause of the fourteenth amendment." *Id.*

Albrecht v. Treon, 118 Ohio St.3d at 352, Pet'rs' App. D, p. 44a.

The Ohio Supreme Court next analyzed statutes found in Chapter 313 of the Ohio Revised Code, those governing the powers and duties of county coroners, noting that "A coroner's forensic examination is a classic function of the police power of the state. Many times, autopsy specimens and the results of the forensic examination are essential evidence in the prosecution of a crime. Sometimes, autopsy specimens must be preserved for long periods of time." *Albrecht v. Treon*, 118 Ohio St.3d, at 355, Pet'rs' App. D, p. 49a.

Acknowledging that R.C. 313.123, enacted in 2006, and which specifically designated autopsy specimens to be medical waste and authorizing the coroner to dispose of them as such, did not apply to Petitioners' claim, the Ohio Supreme Court nevertheless found that other statutes of long standing supported its finding that individuals have no property right in autopsy specimens. For example,

> 'When any person dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner, when any person, including a child under two years of age, dies suddenly when in apparent good health, or when any mentally retarded person or developmentally disabled person dies regardless of the circumstances,' the coroner must be

> immediately notified by the attending physician or law enforcement agency that obtains knowledge thereof. R.C. 313.12.

Id., Pet'rs' App. D, p. 49a. In addition, the Ohio Supreme Court noted:

> [p]ursuant to R.C. 313.121, if a child under two years of age dies suddenly when in apparent good health, the death must be reported immediately to the coroner, and, with certain exceptions, the coroner or deputy coroner must perform an autopsy on the child. In accordance with R.C. 313.121 and 313.131, the coroner may decide not to perform an autopsy on the child if the coroner has reason to believe it would be against the religious beliefs of the child's parents. However, the coroner is authorized under both sections to perform the autopsy in spite of those religious beliefs when the coroner concludes that the autopsy is a compelling public necessity. R.C. 313.131. Further, the Ohio Administrative Code mandates that coroners retain the brain and other specimens resulting from the autopsy of a child under two for a period of at least six months when warranted by the circumstances. Ohio Administrative Code 3701-5-14(B)(6).

Id. at 355-56, Pet'rs' App. D, pp. 49a-50a.

The Ohio Supreme Court further addressed the question of the temporal scope of its holding with respect to a property right in autopsy specimens. "Even before R.C. 313.123 was enacted [in 2006], a deceased's next of kin had no protected right in autopsy specimens pursuant to Ohio statutes." *Albrecht v. Treon*, 118 Ohio St.3d at 355, Pet'rs' App. D, p. 49a. In support of that holding the Ohio Supreme Court thereafter engaged in an exhaustive analysis of Ohio law found in Chapter 313 of the Ohio Revised Code in effect in 1991 governing the conduct of coroners. The Court concluded: "Thus, while R.C. 313.14 gives next of kin a right to disposition of the body, that right does not arise until *after* the coroner has performed his duties, and does not include forensic specimens that were retained by a coroner for forensic examination and testing." *Id.* at 357, Pet'rs' App. D, p. 52a (emphasis in the original).

Petitioners insist, nevertheless, that the Ohio Supreme Court changed Ohio law by "overruling" *Brotherton*. The Ohio Supreme Court stated, in this regard:

> *Brotherton*, however, involved R.C. Chapter 2108, the Anatomical Gift Act, as it related to removal of corneas from autopsy subjects for use by eye banks. Thus, *Brotherton's* specific holding regarding removal of corneas for purposes unrelated to the autopsy is not relevant in this case.

Id. at 352, Pet'rs' App. D, p. 44a.

Accordingly, the Ohio Supreme Court found that a protected interest in autopsy specimens retained for forensic examination and testing has never existed in Ohio. Petitioners' argument notwithstanding, the Ohio Supreme Court's response to the question certified to it by the district court does not involve or even implicate the private right to authorize or decline voluntary organ donation and does not, therefore, result in an unlawful "retroactive" application of Ohio law.

Having received this response, the federal district court dismissed Petitioners' claims, and the Sixth Circuit affirmed. *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010), Pet'rs' App. A, p. 1a. It is from this decision that Petitioners filed their petition to this Court.

As an initial matter, the Sixth Circuit's decision in *Albrecht v. Treon*, addresses Petitioners' ongoing lament that *Brotherton* governs the outcome of their lawsuit against Respondents. "At issue in *Brotherton*, however, was part of Ohio's adoption of the Uniform Anatomical Gift Act, which expressly granted next of kin the right to dispose of a relative's remains." The Sixth Circuit noted, "There is no similar statute at issue in this case." *Albrecht v. Treon*, 617 F.3d 890, 894, FN1 (6th Cir. 2010), Pet'rs' App. A, pp. 6a-7a.

Specifically, in *Brotherton* the Sixth Circuit held:

> OHIO REV. CODE § 2108.02(B), as part of the Uniform Anatomical Gift Act governing gifts of organs and tissues for research or transplants, expressly grants a right to Deborah Brotherton to control the disposal of Steven Brotherton's body.

> * * * * Although extremely regulated, in sum, these rights form a substantial interest in the dead body, regardless of Ohio's classification of that interest. We hold the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment.

Brotherton, 923 F.2d at 482.

Brotherton clearly acknowledges that the rights granted by the state of Ohio arise under the Uniform Anatomical Gift Act, Ohio Revised Code section 2108.01, *et seq.*, and holds further that the rights in question are "extremely regulated." Yet, even Ohio's Uniform Anatomical Gift Act in effect in 1991 at the time *Brotherton* was decided gave the coroner prior right to organs otherwise subject to donation.

> The rights of the donee created by the anatomical gift are paramount to the rights of others **except that a coroner** or, in the coroner's absence, a deputy coroner, **who has, under section 313.13 of the Revised Code, taken charge of the decedent's dead body and decided that an autopsy is necessary, has a right to the dead**

> **body and any part that is paramount to the rights of the donee.**

Ohio Revised Code Section 2108.02(E)(emphasis supplied).

The Sixth Circuit also noted that "the argument that *Albrecht* [*v. Treon*, 118 Ohio St.3d 348 (2008)] impermissibly 'overrules' and conflicts with *Brotherton* is flawed. *Brotherton* is distinguishable from the facts in this case ...." *Albrecht v. Treon*, 617 F.3d at 896, Pet'rs' App. A, p. 12a. Citing to its earlier decision in *Waeschle v. Dragovic*, 576 F.3d 539 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 2063 (2010), the Sixth Circuit stated:

> *Brotherton* and *Whaley*, however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever. The distinction is important because Waeschle might have no right under Michigan law to possess, control, or dispose of her mother's brain once it is removed for legitimate forensic study.

Albrecht v. Treon, 617 F.3d at 897, *quoting Waeschle v. Dragovic*, 576 F.3d at 546-47, Pet'rs' App. A, p. 13a.

Accordingly, the Sixth Circuit held, "this Court and the Supreme Court of Ohio agree that *Brotherton*

applies only in the narrow circumstance of unauthorized removal of body parts for donations ...." *Id.*, Pet'rs' App. A, p. 13a.

Having distinguished *Brotherton* from the present case and determined that *Brotherton* is neither factually or legally similar, the Sixth Circuit addressed Petitioners' argument that their alleged rights under *Brotherton* allegedly "vested" in 2002, the time of the autopsy at issue, an event which occurred prior to the Ohio Supreme Court's 2008 answer to the district court's certified question.

The Sixth Circuit's holding in this regard need not be embellished and cannot be improved upon:

> As explained above, this Court does not define Ohio property law. *Brotherton* did not create a property interest in the next of kin's deceased relative's corneas, but, instead, interpreted that right as it already existed pursuant to Ohio's Uniform Anatomical Gift Act. *Brotherton* is distinguishable from this case and does not control the outcome, therefore, *Albrecht* [*v. Treon*, 118 Ohio St.3d 348 (2008)] did not impact the law as set forth in *Brotherton*. Thus, the question of whether *Albrecht* [*v. Treon*, 118 Ohio St.3d 348 (2008)] should be applied retrospectively or prospectively is inapposite here because ***Albrecht*** [*v.*

> *Treon*, 118 Ohio St.3d 348 (2008)] **did not change Ohio law**.

Id. at 898, Pet'rs' App. A, pp. 15a-16a (emphasis supplied).

A review of the facts of this case and the applicable law, a review performed at length and in depth by the federal district court, the Ohio Supreme Court and the Sixth Circuit Court of Appeals, demonstrates that Petitioners' arguments are unavailing.

3. In the absence of a state-defined property right in forensic autopsy specimens, this Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592 (2010) is irrelevant to this matter.

Petitioners' entire argument is based on the incorrect assumption that *Brotherton* was controlling authority for this case. This is an entirely flawed premise from both a procedural and a substantive standpoint. As to procedure, not a single court in this case's history has held that *Brotherton* was the applicable law. Every court (United States District Court, Ohio Supreme Court, Sixth Circuit Court of Appeals) has held that *Brotherton* is distinguishable and does not apply to the facts and legal issues presented by this case. Thus, from a purely procedural standpoint, Petitioners' argument that a vested right has been unlawfully taken away, is based solely on their own interpretation of Ohio law as well as a convoluted attempt to demonstrate that this Court should perform a *Stop the Beach* analysis.

In actuality, petitioners are asking this Court to simply overrule the Sixth Circuit Court of Appeals, determine that *Brotherton* is applicable, and not distinguishable. This substantive analysis is where petitioners' appeal falls short of constitutional analysis. This is not a case of a vested property right being taken away by a Court's ruling, this is a case distinguishable by facts and by statutes from *Brotherton*, and every court in the two class action suits filed by Petitioners' attorneys in Ohio and in Michigan has held that the facts presented here are simply completely distinguishable:

Albrecht:

Supreme Court of Ohio
United States District Court
Sixth Circuit Court of Appeals

Waeschle:

United States District Court
Sixth Circuit Court of Appeals
United States Supreme Court (denial of petition)
Michigan Supreme Court

Brotherton cannot, as a matter of law and common sense, be controlling authority over a case that involves both different facts and different statutes, and these distinctions are at the heart of all of the cases above. Although there is not a bright line standard for controlling/distinguishing authority, and not much

case law to explain the concept, a different set of facts or a different law distinguishes a case.[3]

A different set of facts or different law distinguishes a case. Here, both the facts and statutes applicable to *Brotherton* and the present case are different, and this case is thus distinguished from that upon which Petitioners rely. Accordingly, *Brotherton* could not have and did not create a "vested" property interest in facts and statutes which were not at issue in *Brotherton*.

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[3] While not directly on point, the following cases establish the parameters of controlling versus distinguishable authority. A prior case "is controlling only in a similar factual situation. Here the facts are clearly distinguishable." *Solem v. Helm*, 463 U.S. 277, 303 (1983) (reversed on other grounds). Essentially, "... a rule is controlling only if it matches the case before the court both 'as to law and fact,' and most cases are distinguishable in some respect." *Williams v. Taylor*, 529 U.S. 362, 377 (2000).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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